Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-870

BENJAMIN FEINLOWITZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the Revised Rules of this Court Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Question Presented

The following question is presented by this appeal:

1. Was wiretap evidence seized under a properly issued wiretap order on June 15, 1966 admissible at a trial on May 22-23, 1969?

Facts

In early May, 1966, the Mount Vernon Police Department received information from a reliable source to the effect that a public telephone in an establishment known as George's Pharmacy at 278 Fourth Avenue in Mount

Vernon was being used to transmit horse and sporting bets. A detective was assigned to check out this information, and on several different occasions he observed the appellant leave his office where, incidentally, there was a telephone and go to George's Pharmacy and use this public telephone. On one such occasion he overheard the appellant discussing baseball lines and quoting odds on that day's games. In reliance on this evidence, the police on May 17, 1966, secured an order from the County Court of Westchester County, Honorable P. Raymond Sirignano, J., authorizing them to intercept and record all conversations over that line (20, 203-210). Pursuant to this order, a tap was installed on May 18, 1966, which consisted of a line starter, a pen register and a tape recorder (22, 27).

On June 15, 1966, this telephone was being monitored by Detective Richard Burke. He set up his vigil on the line at 11:15 A. M., and he maintained it until 4:30 P. M. (54). Normally, these taps are watched on a remote basis, by which we mean that the equipment runs and records automatically when the receiver of the phone being tapped is lifted from the cradle, and that the whole tape is picked up at day's end. That's the function of the line starter. On June 15th it was being run "hot" by Burke, who overheard as well as recorded each call as it was going on (54). A minute or two before 4:23 P. M. he heard one or more sports bets being transmitted over that line, and he immediately radioed Captain Cipriani and Sergeant Colarusso (65-66), who it must be assumed were standing by awaiting such a contingency.

Cipriani and Colarusso immediately entered George's Pharmacy and went directly to the public telephone booth (30, 35-36). In addition to Burke's information, the two officers were armed with a search warrant signed on June 7, 1966, by Honorable John P. Griffith, City Judge of the City of Mount Vernon, which authorized them to search the appellant's person (31-35). They found the appellant

in the phone booth with the receiver in his hand, and on the shelf under the telephone they discovered an envelope and two slips of paper. They asked him to step out of the booth, and he did so, leaving the receiver dangling by the cord. Upon searching him the officers found other slips of paper in his jacket pocket, together with $1,495.42 in cash (36-40). The envelope in the phone booth contained an additional $5,000.00 in cash (39). The slips found in the booth, as well as those found in his pocket, were identified as records of sports bets and baseball lines, i.e., the odds on the baseball games being played that day (96-100). Both were described as gambling records (96).

When the two detectives had placed the appellant under arrest, Colarusso picked up the phone the appellant had dropped and told whoever was on the other end that there had been some trouble (41-42). He then phoned his headquarters and asked that they place a call to him at the number specified in the wiretap order. This procedure was to assure themselves that the tap was on the designated line (43-45).

The tape recording of that 4:23 P. M. conversation was played in its entirety to the jury, and the People's gambling expert, Detective John Roach, identified one of the gambling records introduced in evidence as a record of the three team parlay bet which the taped conversation concerned (100-101). Richard Burke, the detective who made the recording, identified the voice of the appellant on the tape as the receiver of this bet (78).

POINT I

Wiretap evidence lawfully seized prior to June 17, 1968, is admissible in a State Court trial occurring after that date.

On May 17, 1966, Honorable P. Raymond Sirignano, County Judge of Westchester County, signed an order permitting the interception of communications being transmit-

ted over telephone number 914 667 9366, a public telephone located in a pharmacy. The wiretap order was issued in accordance with the provisions of 813a of the New York Code of Criminal Procedure then in effect. Subsequently, that section was declared in part, unconstitutional due to its overbreadth (*Berger* v. *New York*, 388 US 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873), however, such declaration is applied only prospectively (*Kaiser* v. *New York*, 394 US 280, 22 L. Ed. 2d 274, 89 S. Ct. 1044) as the decision has no effect on the truthfinding process.

> "Evidence seized in violation of Section 605 of the Federal Communications Act was 'no less relevant and reliable than that seized in violation of the Fourth Amendment.'"
>
> *Desist* v. *United States*, 394 US 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030, quoting *Fuller* v. *Alaska*, 393 US 80, 21 L. Ed. 2d 212, 89 S. Ct. 61.

The wiretap order was thus constitutionally permissible as it was issued in accordance with the provisions of Section 813a of the New York Code of Criminal Procedure.

Section 605 of the Federal Communications Act then in effect provided (in pertinent part) that,

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." (47 USC 605.)

Such section did not specifically prohibit interception alone, but did prohibit interception and divulgence of any conversation. However, this Court had previously held that such information could be divulged in a State Court trial.

> "We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and

sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."

Schwartz v. *Texas*, 344 US 199, 97 L. Ed. 231, 73 S. Ct. 232.

The evidence seized was thus admissible in a State Court trial which may have taken place on that day.

On June 17, 1968, this Court ruled that evidence seized in violation of § 605 would be inadmissible in State court proceedings as there was no other way of preventing violation of the federal law.

"We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law in the only effectively available way—by removing the incentive to disregard it (*Elkins* v. *United States*, 364 US, at 217)."

Lee v. *Florida*, 392 US 378, 20 L. Ed. 2d 1166, 88 S. Ct. 2096.

As the reason for the new rule was solely to deter future illegal police conduct, the rule was to be applied prospectively only (*Fuller* v. *Alaska*, 393 US 80, 21 L. Ed. 2d 212, 89 S. Ct. 61). As stated by the Court, in considering the exclusionary rule in Chimel, which, it is submitted, is parallel to that in Lee:

"... the Chimel rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after Chimel was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision."

Williams v. *United States*, 401 US 646, 28 L. Ed. 2d 388, 91 S. Ct. 1148.

Therefore, any wiretap evidence seized after June 17, 1968, would not be admissible on trial. If, however, wiretap evidence had been legally seized prior to that date, it would be admissible on trial. Any lingering doubt which may have existed as to the degree of the prospective application of *Lee* was dispelled by the Court's decision in *Kaiser* v. *New York,* 394 US 280, 22 L. Ed. 2d 274, 89 S. Ct. 1044 on March 24, 1969

> "we have held today that Katz is to be applied wholly prospectively. . . . that decision (Lee) has also been held to apply only prospectively."
>
> *Kaiser* v. *New York,* pp. 282-283.

On October 19, 1971, this Court again reaffirmed its holding that wiretap evidence seized prior to June 17, 1968, would be admissible at a trial occurring after that date when it refused to reconsider the issue. *Iannaccone* v. *New York,* cert. den. —— US ——, 30 L. Ed. 2d 164, —— S. Ct. ——).

POINT II

The admission of wiretap evidence is sanctioned by 18 USC title 119.

The petitioner has misstated the date of trial in his petition (p. 18) and thus has misstated the rules in effect on the date of trial. The trial was conducted on May 22 and May 23, 1969, not 1968. Thus, there had been an amendment of 47 USC 605, prior to the date of trial.

Wiretap evidence, to be legally seized, must be obtained under the authority of a Court order.

> "Last Term in *Katz* v. *United States,* 389 US 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 . . . we concluded that since every electronic eavesdropping upon private conversations is a search or seizure, it can comply with con-

stitutional standards only when authorized by a neutral magistrate upon a showing of probable cause and under precise limitations and appropriate safeguards,"

Desist v. *US*, 394 US 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030.

The seizure in the instant case was based upon a Court order properly issued under the New York statute then in effect and hence the evidence in question was lawfully seized (*Kaiser* v. *New York, supra*).

On June 19, 1968, almost a year prior to trial, § 605 of the Federal Communications Act was amended and the portion thereof which would apply to the instant case, transferred to title 18, Chapter 119. § 2515 provides that when any interception has taken place any disclosure is prohibited if there would be a violation of the Chapter. There are thus, again, two separate acts, the interception and the disclosure. (Compare: 18 USC 2517; former 47 USC 605). If the interception is lawful, the evidence obtained therefrom is admissible. It has already been determined that the evidence in the instant case was lawfully seized; therefore, it must follow that such is admissible in evidence.

"Both petitioners were duly convicted when judged by the then existing law; the authorities violated neither petitioner's rights either before or at trial."

Williams v. *United States*, 401 US 646, 28 L. Ed 2d 388, 91 S. Ct. 1148.

Thus, wiretap evidence lawfully seized on June 15, 1966, was properly admitted against the defendant at his trial on May 22 and 23, 1969.

Conclusion

In summary, the position of the respondent is that under previous law the wiretap warrant was valid when executed and subsequent changes in the law do not retroactively invalidate the warrant. The statutory prohibition against introducing wiretap evidence at trial was repealed prior to the tral and the repeal operated prospectively viz-a-viz the time of trial to permit the introduction into evidence of the wiretap maferial. The new statutory requirements with respect to wiretaps were prospective only viz-a-viz the time of the execution of the wretap warrant and accordingly, did not operate retroactively to invalidate the wiretap here. Further, it is respectfully submitted that the unique timing of this case with respect to the tap and to the introduction of the wiretap material into evidence will not be repeated in future cases and accordingly, the situation represented by this case is with respect to future cases purely academic and does not justify the granting of certiorari.

Respectfully submitted,

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